IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
September 17, 2008 Session

STATE OF TENNESSEE v. JASON CHRISTOPHER UNDERWOOD

Appeal from the Circuit Court for Bedford County
No. 15691 Robert Crigler, Judge

No. M2006-01826-CCA-R3-CD - Filed December 10, 2008

The defendant, Jason Christopher Underwood, appeals from his Bedford County Circuit Court jury convictions of two counts of premeditated first degree murder[1] and his two sentences of life imprisonment without the possibility of parole. He claims that the verdicts are not supported by legally sufficient evidence and that the trial court erred in dismissing appointed counsel when the defendant's family hired private counsel to assist, not replace, trial counsel. He further claims that the trial court erred in denying his requests for funds to hire expert witnesses and in denying a continuation of the trial. He claims that the trial court erred in failing to dismiss for cause certain jurors, forcing him to use his preemptive challenges on these jurors. Finally, the defendant challenges the imposition of consecutive sentences of imprisonment for life without the possibility of parole. We affirm the judgments of the trial court.

Tenn. R. App. P. 3; Judgments of the Circuit Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and J.C. MCLIN, JJ., joined.

Robert Marlow, Shelbyville, Tennessee, for the appellant, Jason Christopher Underwood.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; Charles F. Crawford, Jr., District Attorney General; and Michael D. Randles, Assistant Attorney General, for the appellee, State of Tennessee.

OPINION

On October 25, 2004, the bodies of Anthony Baltimore and Rebecca Ray were found at their residence on Simms Road in Shelbyville, Tennessee, by Mr. Baltimore's father and sister. Mr. Baltimore's father contacted the Shelbyville Police Department. Each victim had been stabbed

---

[1] The defendant was also convicted of theft in an amount greater than $1,000 but less than $10,000, *see* T.C.A. §§ 39-14-103 and -105; however, the defendant does not challenge this conviction on appeal.

several times and blood was found throughout the residence. The Tennessee Bureau of Investigation (TBI) investigated the crime scene and found the defendant's fingerprint, preserved in human blood, on the inside doorknob of the back door of the residence. The TBI also found that the defendant's deoxyribonucleic acid (DNA) matched that of a drop of blood found on Ms. Ray's body and that the defendant's DNA was identified in other locations at the Simms Road residence.

On January 20, 2005, the Bedford County Grand Jury indicted the defendant on one count of the premeditated first degree murder of Rebecca Ray, *see* T.C.A. § 39-13-202 (2003), one count of the premeditated first degree murder of Anthony Baltimore, *see id.*, and one count of theft,[2] *see id.* § 39-14-103. The State sought enhanced punishment of imprisonment for life without the possibility of parole, citing as aggravating circumstances that "[t]he murder was especially heinous, atrocious or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death." *See id.* § 39-13-208. After a five-day trial, the jury returned a verdict of guilty on both counts of premeditated first degree murder and on the count of theft. Further, the jury unanimously sentenced the defendant to imprisonment for life without the possibility of parole on both counts of murder. The trial court ordered that the defendant's two sentences of life without parole run consecutively.[3]

The defendant filed a timely appeal and challenges his convictions on five grounds. First, the defendant challenges the sufficiency of the evidence of the premeditated first degree murder convictions. Second, he alleges that the trial court erred in dismissing the lawyer appointed to represent him when his family hired private counsel to "assist" his appointed trial counsel. Third, the defendant alleges that the trial court erred in denying his requests for funds to hire certain experts and in denying the defendant's motion to continue the trial. Fourth, he claims that the trial court erred in denying his motions to excuse for cause certain jurors during voir dire. Lastly, the defendant challenges his sentences, claiming that the two life without parole sentences should not be run consecutively.

Trial Evidence

Hope Shafer, Anthony Baltimore's sister, was the first to discover her brother's body at the Simms Road residence on October 25, 2004. Ms. Shafer testified that she last saw Mr. Baltimore, also known as "Bubba," on October 23, 2004, a Saturday evening. She testified that he visited her at the house where she lived with her father, Anthony Wayne Baltimore (Mr. Baltimore Senior[4]), and her husband. She testified that the other victim, Ms. Ray, was with him and that the two were dating. She also testified that the two would often come to visit at the home. She stated

[2] The indictment for theft was not included in the record.

[3] The trial court also ordered that the theft sentence run consecutively to the two murder sentences; however, the defendant does not challenge this on appeal.

[4] We will refer to the victim's father as "Mr. Baltimore Senior" to prevent confusion between him and his son, who will be referred to simply as "Mr. Baltimore."

that they arrived between 8:00 and 9:00 p.m. and that they left at approximately 10:00 p.m. Ms. Shafer testified that the victims said that they would return later that evening, but they never did.

According to Ms. Shafer, on October 25, 2004, the following Monday, she and her father went to Mr. Baltimore's residence at Simms Road, where he lived with Ms. Ray. She testified that she and Ms. Ray were in General Educational Development (GED) classes together, and on Mondays through Thursdays she and her father picked up Ms. Ray to drive to class. Mr. Baltimore Senior drove the vehicle around the back of the house, and Ms. Shafer noticed that Mr. Baltimore's truck was missing and that the back door, which was the only means of ingress or egress from the home, was cracked open. At 8:16 a.m., she left the vehicle and pushed the back door open. Ms. Shafer testified that she saw her brother's body lying on the floor. Her father then arrived, touched the body, and told her that the body was cold.

Ms. Shafer stated that after discovering Mr. Baltimore's body, her father drove her to a store down the road to call 9-1-1. After contacting 9-1-1, Mr. Baltimore Senior left to go back to the Simms Road house, and Ms. Shafer stayed at the store.

On cross examination, Ms. Shafer stated that she knew that Mr. Baltimore had used marijuana. She testified that she had "heard about" his using cocaine, but did not know whether he did or not. She stated that her brother worked at a roofing company and was physically strong. Ms. Shafer testified that she knew that Ms. Ray also used marijuana, but she did not know if she used any other drug. She also agreed that Ms. Ray often fought both men and women and would always "win" the fight. According to Ms. Shafer, Ms. Ray "didn't back down from anybody" and "she'd get physical with the people."

Mr. Baltimore Senior testified that he purchased a 1993 GMC pickup truck for his son three or four months before he was killed. He stated that Anthony Baltimore had intended to stop by his home to pick up a Dodge van that needed "some work" on Sunday, October 24, 2004, but his son never came to his house on that day. He testified that he drove by the Simms Road house that Sunday but saw that Anthony Baltimore's truck was not parked there so Anthony Baltimore assumed that he was not home and did not stop. He testified that, to his knowledge, Ms. Ray was "pretty much always with Bubba" except when she was at her GED classes.

Mr. Baltimore Senior testified that on October 25, 2004, he drove Ms. Shafer to the Simms Road residence. He stated that after Ms. Shafer entered the house, he heard her scream "real loud." He then entered the residence and found his son lying on the living room floor. He testified that he touched Mr. Baltimore's arm, which was cold, and realized that his son was dead. Mr. Baltimore Senior stated that, after going to the store to call the police, he returned to the Simms Road residence, leaving Ms. Shafer at the store. At that time, he found Ms. Ray's body on the floor. He touched her ankle, which was also cold. Mr. Baltimore Senior testified that he then waited for the police to arrive.

The first law enforcement officer to report to the Simms Road residence, James Wilkerson of the Shelbyville Police Department, testified that he arrived at the scene and met Mr. Baltimore Senior. He testified that once he learned that it was not possible to preserve the life of either victim, he secured the perimeters of the property and contacted the Criminal Investigation Division of the Shelbyville Police Department. Officer Wilkerson also testified that he put a "be on the lookout" (BOLO) on the 1993 GMC truck that had belonged to the Anthony Baltimore and was missing from the residence.

Detective Sergeant Jason Williams of the Shelbyville Police Department's Criminal Investigation Division testified that he was briefed at the crime scene when he first arrived and then he performed a "visual scan" of the area with Lieutenant Pat Mathis. He noted that the back door did not look as if it had been forced open. He testified that he saw what appeared to be blood "just everywhere." He stated that he found a male body, "caked" in dried blood, wearing only blue jeans and socks. He testified that the body appeared to have stab wounds covering the upper torso and that he observed large amounts of blood in the den area. He also saw a female body where the den area met with a hallway. He stated that the female victim was wearing only a tee shirt and was covered in blood. Detective Williams further testified that he noticed several shoe prints in dried blood that appeared to be from the same shoe sole. He testified that he saw a large pool of blood in the carpeted floor section of the rear bedroom. He also noticed "smear marks" of dried blood that appeared to come out of the back bedroom of the residence and formed a pattern in the direction of Ms. Ray's body. He also testified that he found an aerosol can in the back bedroom that appeared to have blood on it. Pictures and videos depicting these scenes were entered into evidence. Detective Williams testified that, after the initial sweep of the area, he and Lieutenant Mathis decided to request assistance from the TBI.

Lieutenant Mathis, a law enforcement officer since 1989, testified that after arriving at the Simms Road residence, he contacted the district attorney general's office to get approval to contact the TBI crime lab. He stated that he contacted the TBI crime lab in Nashville, which sent an investigation unit approximately three hours later.

The TBI arrived at approximately 12:07 p.m. At that time, according to Detective Williams, the TBI "mainly did the investigation." Detective Williams stated that, after the TBI arrived, he located Mr. Baltimore's 1993 GMC pickup truck at Corsicana Bedding, a business located in Shelbyville. He stayed at the scene with the TBI agents while Lieutenant Mathis, Detective Lori Mallard, and Major Jan Phillips left to examine the pickup truck. He testified that the victims' bodies were taken from the scene at approximately 4:00 p.m., and the TBI agents finished processing the Simms Road residence at 7:48 p.m.

Steve Scott, a TBI Special Agent Forensic Scientist who served on the Violent Crime Response Team, testified that he was the TBI's lead investigator in the case. Agent Scott testified that he had been with the TBI crime lab for more than 19 years. He stated that, upon arriving in Shelbyville, he received a briefing from Lieutenant Mathis and Detective Williams. He and the TBI investigation unit then worked through the Simms Road residence.

Agent Scott testified that the investigation unit vacuumed each room separately with a special filter to catch hairs and fibers that could have been relevant. He removed the doorknob of the back door for the evidence laboratory because he noticed blood and hair on it. He also testified that he observed a fingerprint on the doorknob, and the TBI laboratory later determined that it matched the defendant's fingerprint. He also noticed a 25-pound bag of dog food that was knocked over that had blood smears on it. He collected a condom that appeared to be used that was lying close to Ms. Ray in the hallway. He also testified that he observed a fingerprint or hand print preserved in blood on Ms. Ray's leg. He testified that most of the blood on Ms. Ray was smeared, which indicated handling.

Doctor Amy R. McMaster, the Deputy Chief Medical Examiner for Davidson County[5], performed the autopsies of the victims. She testified that Mr. Baltimore had 41 stab and incised wounds to his body. Additionally, she stated that he had multiple abrasions and linear incised wounds. She noted that Mr. Baltimore's deepest stab wound was five inches and located on his back. Doctor McMaster testified that Mr. Baltimore had injuries to his right lung, left lung, liver, neck bones, and the muscle on the inner portion of his rib cage. She stated that the stab wounds extended from many directions. She could not testify whether all the cuts were made with the same blade.

Doctor McMaster testified that none of Mr. Baltimore's injuries would have immediately incapacitated him. She stated that, in her opinion, the cause of death was multiple stab wounds by another person. Doctor McMaster testified that he died due to blood loss from injuries to his internal organs, and it could have taken as long as "a few minutes" for Mr. Baltimore to die. She testified that the wounds inflicted upon Mr. Baltimore exceeded that necessary to cause his death and that Mr. Baltimore would have suffered before his death. She testified that Mr. Baltimore did not appear to have any defensive wounds.

Doctor McMaster also testified that Mr. Baltimore had two substances in his blood: ecgonine methylester and benzoylecgonine. She explained that both substances were cocaine metabolites and that Mr. Baltimore had used cocaine very recently before his death.

Doctor McMaster testified that Ms. Ray had 59 stab and incised wounds to her head, face, neck, torso, and extremities. In addition, she found multiple superficial incised wounds and abrasions. She stated that Ms. Ray had contusions on her arms and legs and on her left eye. She noted that one of Ms. Ray's stab wounds actually entered her ear canal, and the deepest stab wound was approximately four inches to her chest/abdomen region. Doctor McMaster testified that Ms. Ray's neck muscles, heart, lungs, liver, kidney, colon, and spinal cord tissue were damaged. She stated that Ms. Ray's jugular vein was damaged as well.

[5] Doctor McMaster also worked for a private company that performed medical examinations, and it was for this company that she performed the autopsies in this case for Bedford County.

Doctor McMaster testified that, like Mr. Baltimore, none of Ms. Ray's injuries would have immediately incapacitated her, and, in her opinion, the cause of death was multiple stab wounds by another person. She testified that Ms. Ray would have been conscious and suffered for some period of time before death. She testified that the wounds inflicted upon Ms. Ray exceeded that necessary to cause her death. She testified that Ms. Ray appeared to have defensive wounds on the back of her right hand.

Doctor McMaster testified that she performed a "rape kit" on Ms. Ray, which she turned over to the TBI for later analysis. She also noted that Ms. Ray's toxicology report showed the presence of cocaine and benzoylecgonine. She testified that this finding indicated the use of cocaine within an hour of her death. She also testified to the presence of tetrahydrocannabinol (THC) and carboxy THC, a metabolite of marijuana.

While the TBI and Shelbyville Police Department's Criminal Investigation Unit collected evidence from the Simms Road residence and the autopsies were performed on the victims' bodies, law enforcement officers searched for Mr. Baltimore's 1993 GMC pickup truck. Michael Wilhelm was an employee of Corsicana Bedding when he found what was later identified as Mr. Baltimore's pickup truck parked in the company's parking lot. He testified that he did not know who the truck belonged to, so he waited until noon on October 25 to see if anyone would retrieve it. He testified that he then called a wrecker service to have it towed. Michael Spray was the tow-truck driver who received the call from Mr. Wilhelm to tow a pickup truck from Corsicana Bedding in the "early afternoon" of October 25, 2004. Mr. Spray stated that, as part of his occupation, he monitored police radio traffic and had heard the BOLO regarding the 1993 GMC pickup truck. He stated that, upon observing the truck, he noticed what appeared to be blood on the seats and contacted the police.

Major Jan Phillips of the Shelbyville Police Department testified that he received a call reporting the whereabouts of the 1993 GMC pickup truck at 3:36 p.m. on October 25, 2004. He then went to observe the truck and saw blood stains in the truck. He testified that he saw what appeared to be blood splatter on the "outside post area between the window and the bed of the truck." He also observed possible blood splatters on some of the gravel outside of the driver's side door. He testified that at that time, he contacted Lieutenant Mathis of the Criminal Investigation Division of the Shelbyville Police Department.

Lieutenant Mathis testified that he reported to Corsicana Bedding, where the victim's pickup truck was found, and performed an initial inspection of the pickup truck. He stated that he observed what appeared to be blood on the seats, the floor mat, the exterior of the truck, and the gravel outside of the truck. He testified that, after photographing the truck, he arranged for it to be towed to a secure location so that the TBI could process it the following day. He also testified that he collected some of the bloodstained gravel for analysis.

Lieutenant Mathis also testified that, although he could not remember exactly how he received the information, he learned that a man named Michael Smith reported that he "had seen

a truck fitting the description of Bubba Baltimore's truck when it was parked between two trailers there at Corsicana Bedding, and a dark individual fled from the vehicle."

Lieutenant Mathis testified that he contacted Ranger Shane Petty of the Tennessee State Park service at Henry Horton State Park, who handled bloodhounds that performed human tracking. Ranger Petty arrived in Shelbyville on the morning of October 26, 2004. He testified that, after the TBI finished processing the pickup truck, he gave Ranger Petty the floor mat of the pickup, which the bloodhound used to "get a scent." He testified that they then went to Corsicana Bedding, where Mr. Baltimore's truck was found abandoned. The bloodhound "alerted" on the scent and started to track it. He testified that the dog headed across the road and wound through a wooded area, ending at a creek bed approximately 100 yards from a house that was later identified as the defendant's grandmother's residence. He testified that the defendant lived in a house across the street from his grandmother. He stated that the distance between where the truck was abandoned and the defendant's residence was approximately three-tenths of a mile.

On cross examination, Lieutenant Mathis testified that he learned that the victims might have purchased drugs from someone called "OD" and/or a man named Greg Marlin. He testified that OD's house was also three-tenths of a mile from the abandoned truck. He also stated that three beer cans found in the Simms Road residence had DNA that matched that of a man named Charles Oldfield. He interviewed Mr. Oldfield, who stated that he had been at the Simms Road house drinking beer and "smoking dope" with the victims on the Thursday or Friday before the murders. Lieutenant Mathis testified that Mr. Oldfield reported that he was at the Simms Road residence with Brent Sadler and that he interviewed Mr. Sadler as well. After his interviews, Lieutenant Mathis concluded that other witnesses had seen the victims alive after the night that Mr. Oldfield and Mr. Sadler had visited the Simms Road residence.

Thomas Shane Petty, Chief Ranger for the State Park System of Tennessee, testified that he used a bloodhound to track a human trail from Corsicana Bedding to the defendant's neighborhood. He testified that he had been the Chief Ranger since 1997 and that his office was based at Henry Horton State Park. He stated that he was a certified law enforcement officer and that part of his job was leading search and rescue for the Tennessee State Parks. This included both horse-mounted searches and canine searches. Ranger Petty testified that he had worked with bloodhounds since 1993.

He stated that on October 26, 2004, Detective Mathis contacted him about the use of a bloodhound. He testified that he used the floor mat of the pickup truck to provide a scent for the dog, and the dog caught the scent at Corsicana Bedding and traced it across the highway into a wooded thicket area. He testified that they

> meandered across the creek there, drainage a couple of times. And we got to an area. We came out in a field, small field, and went back down to the creek. And we went straight down the creek. And it was very, very rough terrain, or a lot of bushes and shrubs, briars and thick

> area. The dog came out of the creek into an open area, back yards of a neighborhood. And we were unable to continue the trail from that point.

Ranger Petty testified that he and the dog completed this trail three times.

Detective Williams testified that during the initial investigation of the murders at the Simms Road residence, no suspects were identified. He reported that he and other officers of the Shelbyville Police Department interviewed "[w]ell over 100" people during the investigation, following any rumors or leads that they found. On cross examination, Detective Williams testified that, during the course of the investigation, he learned that both of the victims were involved in drugs, including cocaine and crack cocaine. He also testified that some of the information he learned suggested that the victims had "stiffed" people in drug transactions. However, he noted that obtaining information about such drug transactions involving the victims was difficult because the people involved in drugs were not forthcoming with information. Detective Williams also opined that "it is obvious that whatever went on [at the Simms Road house] was a struggle and was very brutal."

Officer Wilkerson testified that he conducted door-to-door interviews canvassing the area near where the pickup truck was found at Corsicana Bedding after learning that someone reported seeing a "dark man" run from the truck. Before knowing that the defendant was a suspect, he visited his home as part of these canvas interviews on or about November 1, 2004. He testified that he asked to see the defendant's hands, and he noticed a "knick" on one of his index fingers. Officer Wilkerson testified that this did not "set any alarms off" with him. He testified that when he told the defendant of the murders, the defendant stated that he had no knowledge of the matter. He "noticed that [the defendant] was kind of nervous acting," but he "didn't think nothing about it, because, just about everybody that [he] went to that day appeared . . . alarmed." On cross examination, Officer Wilkerson explained that, after discovering the scene at the Simms Road residence, he and the police department reasoned that the perpetrator would be badly cut. For this reason, they first checked hospitals and clinics to see if anyone had reported being badly cut and asked to see people's hands during their interviews.

While the Shelbyville Police Department continued its investigation, the TBI tested evidence collected from the Simms Road residence. Mike Tuberville, a TBI special agent forensic scientist in the serology DNA unit, testified that he observed a single blood drop located on Ms. Ray's left thigh. He found the blood drop particularly interesting because, while most of Ms. Ray's body was covered with smeared blood, the single blood drop was not smeared. This indicated that the blood had dripped onto Ms. Ray after she was already covered with smeared blood. He testified that he sampled the solitary drop of blood and determined that it contained the defendant's DNA.

Agent Tuberville also testified that he tested the blood on the doorknob that had been removed by Agent Scott. The blood showed a mix of Ms. Ray's and the defendant's DNA as well as trace DNA from Mr. Baltimore. He also tested the blood on the aerosol can found in the back

bedroom and found that it matched the DNA of the defendant. He testified that he sampled what appeared to be blood on a compact refrigerator in the back bedroom, and the DNA matched Ms. Ray with a small contribution from Mr. Baltimore.

Agent Tuberville stated that he tested the samples from the "rape kit" that was performed on Ms. Ray by Dr. McMaster. The rape kit included vaginal, anal, and oral swabs for DNA, as well as fingernail clippings. He testified that the oral and vaginal swabs showed that Ms. Ray was the major contributor of DNA and that Mr. Baltimore was a minor contributor. He testified that the anal swab also showed that Ms. Ray was the major contributor with Mr. Baltimore as a minor contributor; however, he also noted the possible presence of a third contributor. Although he could not state definitively that the DNA matched the defendant, he could not rule the defendant out as the third contributor. Also, Agent Tuberville stated that he could not determine whether the trace DNA of the third contributor came from blood or semen, as there were large amounts of blood at the crime scene and Ms. Ray was not clothed from her waist down. He testified that the fingernail clippings contained the DNA of Ms. Ray as the major contributor and Mr. Baltimore as a minor contributor. He also stated that he tested the condom found in the vicinity of Ms. Ray and found no spermatozoa.

Agent Tuberville also tested the blood samples from the pickup truck. He stated that the blood from the inside of the driver's side door of the truck matched the DNA of the defendant. The blood from the floor mat of the pickup matched the DNA of Mr. Baltimore with a minor contribution from Ms. Ray. He testified that he tested the stained gravel and that the blood showed DNA contributions from both victims.

On cross examination, Agent Tuberville stated that he did not test any knife found at the scene. He also testified that he tested a pair of jeans and a pair of shoes that the defendant claimed that he wore at the time of the stabbing and found no blood on them.

Darrin Shockey, a forensic scientist for the TBI in latent print examination, testified that he had been in his position for six years. He stated that he tested the latent fingerprint preserved in dried blood on the back doorknob. He testified that he analyzed the print using the Automated Fingerprint Identification System (AFIS), which identified several possible matches, listing the defendant as one possibility. He then made a manual comparison and determined that the print on the doorknob belonged to the defendant. Agent Shockey testified that his supervisor approved of the match. He made this discovery on November 10, 2004, and at that time he contacted the Shelbyville Police Department to notify it of the match.

Agent Shockey stated that he also lifted three fingerprints from a coffee mug found on the living room table and compared them with known fingerprints of the defendant. He testified that the fingerprints matched. He also found latent prints on the pickup truck and compared them to the known fingerprints of the victims and the defendant; however, he could not find a match. According to his testimony, Agent Shockey tested several other items, but he could not find latent fingerprints on most of the items he reviewed.

He further testified that he noticed what appeared to be a hand print, preserved in blood, around Ms. Ray's left calf. He utilized detailed photos of the print and compared it to the latent palm print of the defendant. He stated that he "[could] testify . . . 100 percent, without a doubt" that the defendant's right palm touched Ms. Ray's left leg. He testified that opposite the latent print he could see similar prints, but these prints were not clear enough for him to analyze. On cross examination he noted that this was the first time he had been able to analyze latent fingerprints preserved in blood from a human body.

Detective Williams testified that at approximately 9:00 a.m. on November 10, 2004, he received information from the TBI that the bloody fingerprint on the back doorknob at the scene of the crime matched the defendant, and he contacted the district attorney general's office. He obtained three warrants, two for first degree murder and one for theft.

Officer Wilkerson testified that he helped to execute the warrants on the defendant issued November 10, 2004. He and Lieutenant Mathis drove by the defendant's house but noticed that he was at his grandmother's house and about to leave in a red Chevrolet Monte Carlo. He testified that the defendant then sped off in the vehicle and that he and Detective Mathis pursued him. They followed the defendant into a driveway and approached the defendant to speak with him. Because neither officer was in uniform, Officer Wilkerson had to return to his vehicle to get handcuffs to arrest the defendant. When he did this, the defendant ran off, "literally out of his tennis shoes." The defendant ran to Bedford Manor Apartments and eventually was found hiding in a residence. There he surrendered and was taken into custody.

Lieutenant Mathis also testified to the arrest of the defendant in substantially the same detail as Officer Wilkerson. Lieutenant Mathis testified that after the defendant fled on foot, he secured his shoes in the vehicle. He stated that after the defendant's arrest, he took the defendant's palm print for analysis.

Detective Williams testified that after the defendant was brought into custody, he was placed in an interview room until officers could return to the police station and all relevant paperwork was completed. Detective Brian Crews of the Shelbyville Police Department joined him in the interview room, and they started the interview at approximately 11:20 a.m. on November 10. He testified that he and Detective Crews introduced themselves, stated the purpose of the interview, and informed the defendant of his *Miranda* rights. He stated that nothing about the defendant's behavior indicated that he did not understand his rights or that he was under the influence of any intoxicant. He testified that the defendant agreed to speak with the officers, and the interview was video recorded. Detective Williams testified that the defendant, by his own request, gave another statement on February 25, 2005.[6]

The State introduced into evidence the defendant's taped interviews with Detective Williams. Initially, the defendant denied that he had been to the victim's house and maintained that

[6]The video of the February 25, 2005 interview was not included or transcribed in the record.

he did not know the victims well. Detective Williams then told the defendant that his fingerprint was preserved in blood on the back doorknob. At that point the defendant stated that he had been to the Simms Road residence, and that a friend of his named "Kevin" dropped him off at the home. He stated that the door was open and he saw the victims, already badly wounded, lying on the floor. He stated that Mr. Baltimore tried to speak to him but was unable to speak.

The November 10, 2004 interview video showed that the defendant then gave a third version of the events. He stated that Mr. Baltimore was "tripping" and hitting him as he "was getting up and down and moving around." The defendant stated that he was using powder cocaine and that Mr. Baltimore was smoking crack cocaine. He stated that Ms. Ray started "tripping" as well. The defendant stated to Detective Williams that Mr. Baltimore became angry because he ran out of crack cocaine. He stated, "[A]s I got ready to get up he hit me in the back of the head with [a] bottle." He also stated that Ms. Ray struck him with a pipe. During the interview, the defendant stated that a fight ensued and a knife fell from the counter and that Mr. Baltimore grabbed the knife. He stated that when he tried to "roll over" the knife, it stabbed Mr. Baltimore in the chest. He stated, "I grabbed the knife and I was punching with all I had and it was like it wasn't doing any good," and he eventually took the knife away from Mr. Baltimore. The defendant then told Detective Williams that he swung the knife behind him to ward off Ms. Ray's attacks with the pipe, and he hit her. He then stated, "I hit [Mr. Baltimore] like a couple of times with the knife" and that Ms. Ray attacked him and that he "hit her, like once or twice with the knife." The defendant stated that Mr. Baltimore fell to the ground and that, after that, the defendant could not do anything because he was "in shock."

Detective Williams stated that the defendant had an injury behind his ear. He also had an injury on the knuckle of his right index finger and another on the joint near his thumb. The defendant stated, according to Detective Williams, that he received the scratch on his thumb joint while fleeing from the police before his arrest. The defendant also had various scratches on his palms that he explained were from the police pursuit. Detective Williams stated that the defendant had a scratch above his left elbow that the defendant believed was from the altercation at Simms Road.

On cross examination, Officer Williams stated that both victims died with drugs in their system. He stated that, during one of the interviews, the defendant admitted to stabbing the victims; however, he acknowledged that at points during the defendant's interviews, the defendant was being untruthful. He acknowledged that the defendant stated that Mr. Baltimore hit him with a Crown Royal bottle, although no such bottle was found at the scene, and that the defendant stated that Ms. Ray hit him with a pipe, although no pipe was found at the scene. Further, Officer Williams acknowledged that the defendant stated that he was wearing the same shoes and pants at the interview that he wore at the scene of the crime. He acknowledged that the pants and shoes tested negative for blood upon the TBI's analysis. Also, although the defendant reported that the victims were smoking crack cocaine, Officer Williams testified that no crack pipes were found at the scene. Despite the fact that the defendant stated that Mr. Baltimore was upset that he had to cook more crack cocaine, no cooking devices were seen at the crime scene.

After the State rested its case, the defense first called Kathy Shamblin, the defendant's optometrist. Doctor Shamblin testified that the defendant had 20/150 vision, which meant "[w]hat you can stand back and see at 150 feet, he would need to be 20 feet to see the same size."

The defense next called Terrance Lee Scott Smith, the defendant's second cousin. He testified that he saw the victims on October 23, 2004, the Saturday night before their bodies were discovered. He testified that he saw them at the defendant's grandmother's house around 11:45 p.m. He stated that they were with his uncle, his uncle's girlfriend, and his uncle's two children. According to his testimony, Mr. Smith left the house around midnight and returned around 1:45 a.m. When he returned to the defendant's grandmother's house, the defendant and the victims were no longer at the house.

The defense called Bandy Nicole Clark, who resided in the apartment at Bedford Manor Apartments where the defendant was ultimately arrested on November 10, 2004. She testified that she had invited the defendant into her apartment and that he did not break into her home.

The defense last called Lisa John Hillis, who lived next door to the Simms Road residence where the victims were found. She testified that at 2:45 a.m. on Sunday morning, October 24, 2004, she heard what "sounded like a four wheeler" coming through her back yard, and she got up to see what was happening but could not see anything. She testified that, at approximately 3:00 a.m., "the four wheeler fired back up and raced off." She testified that had happened every night since she moved next door to the victims' residence on Simms Road in June of 2004. She stated that, after the early morning of October 24, 2004, she never heard the four wheeler again.

Ms. Hillis further stated that around dinner time on Sunday, October 24, 2004, she saw a "deep wine colored" Dodge Caravan that "looked like it'd been kind of beat up on one side" pull up to the victims' home. She testified that she saw a white male with a medium build and "blondish-brownish" hair "beating" on the front door. After nobody answered, the man returned to the van and left. She testified that she informed Officer Wilkerson about the van. Ms. Hillis also testified that, the following day, October 25, 2004, while law enforcement worked at the crime scene, she saw the same van seven or eight times.

The defendant chose not to testify, and the defense rested. Based on the evidence as summarized above, the jury convicted the defendant of two counts of premeditated first degree murder and one count of theft.

Sufficiency of the Evidence

The defendant challenges the sufficiency of the evidence, arguing that the evidence adduced at trial cannot legally support a conviction of *premeditated* murder. While the defendant's brief admits that "[t]he defendant cannot--in good faith--argue that the evidence was not sufficient

for the jury to have found him guilty of killing these victims," the defendant argues that no evidence was adduced to show the essential element of premeditation.

A convicted criminal defendant who challenges the sufficiency of the evidence on appeal bears the burden of demonstrating why the evidence is insufficient to support the verdict because a guilty verdict destroys the presumption of innocence and replaces it with a presumption of guilt. *See State v. Evans*, 108 S.W.3d 231, 237 (Tenn. 2003); *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000); *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). This court must reject a defendant's challenge to the sufficiency of the evidence if, after considering the evidence in a light most favorable to the prosecution, we determine that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *State v. Hall*, 8 S.W.3d 593, 599 (Tenn. 1999).

On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. *See Carruthers*, 35 S.W.3d at 558; *Hall*, 8 S.W.3d at 599. A guilty verdict by the trier of fact accredits the testimony of the State's witnesses and resolves all conflicts in the evidence in favor of the prosecution's theory. *See State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). Issues of the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this court will not re-weigh or re-evaluate the evidence. *See Evans*, 108 S.W.3d at 236; *Bland*, 958 S.W.2d at 659. This court may not substitute its own inferences drawn from circumstantial evidence for those drawn by the trier of fact. *See Evans*, 108 S.W.3d at 236-37; *Carruthers*, 35 S.W.3d at 557.

Tennessee Code Annotated section 39-13-202(a)(1) provides that "[f]irst degree murder is . . . [a] premeditated and intentional killing of another." T.C.A. § 39-13-202(a)(1) (2003). "'[P]remeditation' is an act done after the exercise of reflection and judgment." *Id.* § 39-13-202(d).

Proof of premeditation is inherently circumstantial. The trier of fact cannot speculate what was in the killer's mind, so the existence of premeditation must be determined from the defendant's conduct in light of the circumstances surrounding the crime. *See State v. Gann*, 251 S.W.3d 446, 455 (Tenn. Crim. App. 2007). Thus, in evaluating the sufficiency of proof of premeditation, the appellate court may look to the circumstances surrounding the killing. *See, e.g., Bland*, 958 S.W.2d at 660; *State v. Coulter*, 67 S.W.3d 3, 72 (Tenn. Crim. App. 2001). Such circumstances may include "the use of a deadly weapon upon an unarmed victim; the particular cruelty of the killing; declarations by the defendant of an intent to kill; evidence of procurement of a weapon; preparations before the killing for concealment of the crime[;] and calmness immediately after the killing." *Bland*, 958 S.W.2d at 660. The number of a murder victim's wounds may be considered evidence of premeditation, *see State v. Nichols*, 24 S.W.3d 297, 302 (Tenn. 2000); however, the number of blows or wounds is not, in and of itself, sufficient circumstantial evidence upon which to draw an inference of premeditation. *See State v. Brown*, 836 S.W.2d 530, 543 (Tenn. 1992).

This court holds that sufficient evidence of premeditation was presented to the jury to support the defendant's convictions. In the light most favorable to the State, the evidence suggests that neither victim was armed at the time that the defendant attacked. Although the record shows that several knives laid throughout the home, nothing in the evidence showed that either victim used them or any other weapon to aggravate or thwart his or her aggressor. Further, the record amply supports that this crime was particularly cruel. The State characterized the Simms Road residence as a "slaughter house" covered in blood. The victim's bodies were mutilated, and Doctor McMaster testified that both victims suffered before their deaths. Further, Doctor McMaster stated that both victims were stabbed in excess of what was required to cause death. The evidence showed a pool of blood in the back bedroom followed by a streak of blood leading to Ms. Ray's blood-smeared body. From this the jury could infer that Ms. Ray crawled or was dragged during the course of the killing. The number of wounds further indicate premeditation. Doctor McMaster testified that Ms. Ray received 59 stab wounds and that Mr. Baltimore suffered from 41. Additionally, the victims' bodies suffered superficial wounds, abrasions, and contusions. Not only does the sheer number of wounds show the heinous nature of the crime, but it shows that these wounds were inflicted over a prolonged period of time in which the defendant could form premeditation.

This court also finds the nature of these wounds, stabbing wounds, are more consistent with premeditation than other types of wounds, such as gunshot wounds. The physical act of homicide through stabbing by its very nature requires more effort, time, and intimate contact than does simply pulling the trigger of a gun. *See State v. Reid*, 164 S.W.3d 286, 311 (Tenn. 2005) (finding sufficient evidence of premeditation from nature and number of stab wounds and the fact that "the victims bled to death in a secluded area"); *see also State v. Keough*, 18 S.W.3d 175, 181 (Tenn. 2000) (finding sufficient evidence of premeditation from the brutal nature of stabbing). Here, the defendant physically used his hands and a blade to pierce his victims at least 100 times. Also, this court finds the number of victims relevant when considering premeditation. The fact that the defendant brutally stabbed two people certainly required greater effort, time, and difficulty than that required to kill one person. The jury could conclude that murdering two victims would prolong the act of the killing and allow for the formation of premeditation.

Because we hold that the defendant's convictions for premeditated first degree murder are supported by sufficient evidence, we now must consider whether the evidence was sufficient as a matter of law to support a sentence of life imprisonment without the possibility of parole. In the present case, the jury was instructed that it could impose such an enhanced sentence if "[t]he murder was especially heinous, atrocious or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death." *See* T.C.A. §§ 39-13-207(b), -204(i)(5) (2003).

When a defendant is convicted of first degree murder and the State does not seek the death penalty, the defendant shall be sentenced to a life in prison. *Id.* § 39-13-204(a), (f). The jury may determine that the life sentence shall be served with no possibility of parole if it finds unanimously and beyond a reasonable doubt that at least one statutory aggravating circumstance exists. *Id.* § 39-13-204(f)(2). The "especially heinous, atrocious, or cruel" factor, relied upon by the

State and found by the jury in the present case, is one such aggravating circumstance. *Id.* § 39-13-204(i)(5).

Our supreme court has defined "torture" as "the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious." *State v. Pike*, 978 S.W.2d 904, 917 (Tenn. 1998); *State v. Williams*, 690 S.W.2d 517, 529 (Tenn. 1985). With respect to "serious physical abuse beyond that necessary to produce death," the high court has previously explained that "serious" alludes to a matter of degree and that physical, rather than mental, abuse must be "beyond that" or more than what is "necessary to produce death." *See State v. Nesbit*, 978 S.W.2d 872, 887 (Tenn. 1998). "The (i)(5) aggravating circumstance may be applied if the evidence is sufficient to support either torture or serious physical abuse beyond that necessary to produce death." *State v. Rollins*, 188 S.W.3d 553, 572 (Tenn. 2006); *State v. Suttles*, 30 S.W.3d 252, 262 (Tenn. 2000).

We view the sufficiency of the evidence for an aggravating circumstance under the standards of *Jackson*, 443 U.S. 307, 99 S. Ct. 2781. Thus, we determine whether, after viewing the evidence in a light most favorable to the State, a rational trier of fact could find the aggravating circumstance beyond a reasonable doubt. *See Williams*, 690 S.W.2d at 530. In recognition of the substantial discretion afforded jurors in determining which sentence to impose, the statute governing appellate review declares that a sentence of life in prison without the possibility of parole will be considered appropriate if the State proved beyond a reasonable doubt at least one statutory aggravating circumstance contained in Code section 39-13-204(i) and the sentence was not otherwise imposed arbitrarily so as to constitute a gross abuse of the jury's discretion. T.C.A. § 39-13-207(g).

In the second half of the bifurcated trial, the jury determined whether the defendant would receive either a life sentence or life without parole. After the State reiterated the multiple wounds and the mutilation of the victims and the testimony of Doctor McMaster, the defendant called two mitigating witnesses. First, he called Misty Akin, who was the defendant's special education teacher at Central High School. She testified that the defendant had a specific learning disability in written expression and that he received special education resource services for English and mathematics. She also testified that there was "a request for information in his special ed record . . . wanting clarification on a seizure disorder." Ms. Akin testified that, in her classroom, she never had a problem with the defendant's interaction with peers. Although she had heard that he had some "problem with authority," she never experienced any problems. The defense also called Demetria Alexandria Ryan Underwood, the defendant's sister, who testified that the defendant had helped raise her since their mother worked as a truck driver and was often not at home.

The jury acted within its province by sentencing the defendant to life imprisonment without the possibility of parole. As the facts indicate, the evidence certainly permitted a jury to find the crime heinous and cruel, and the mitigating evidence presented was easily outweighed by the aggravating nature of the murders.

Thus, following the well-settled rules governing our review of the sufficiency of the convicting evidence, we affirm the defendant's convictions of premeditated first degree murder and sentences of life imprisonment without the possibility of parole.

Substitution of Counsel

The record shows that the defendant had several different attorneys during the pre-trial period. The defendant's family first funded private counsel for the defendant who then withdrew from representation. The court then appointed the public defender's office to represent the defendant. After a conflict of interests was discovered, the public defender's office withdrew from the case, and the court appointed Hershell D. Koger on July 18, 2005, to represent the defendant. Mr. Koger participated in a significant amount of the pre-trial process. On February 24, 2006, Robert Marlow, who ultimately served as defendant's trial and appellate counsel, filed a notice of appearance.

Mr. Marlow stated to the trial court that he had filed a notice of appearance "to notify the Court and the parties [that he had] been retained and [was] going to take part in anything and represent [the defendant] in any way." Mr. Marlow stated that, "Both Mr. Underwood and his mother and the other family members know by doing so that may very well necessitate the disqualification of Mr. Koger." The court then, at request of the State, called the defendant as a witness to testify whether he had any objection to Mr. Marlow's representing him.

> [THE COURT:] Do you have any objection to the substitution of counsel, that is to replace Mr. Koger with Mr. Marlow as your attorney of record in this case.
> THE DEFENDANT: No, sir.

The trial court then questioned Mr. Marlow:

> THE COURT: When you use in this Notice of Appearance the phrase "assist in the defense," is that a full and unqualified entry of appearance to represent the defendant?
> MR. MARLOW: Yes, Your Honor.
> THE COURT: You are not asking to assist and be co-counsel with Mr. Koger. You are asking to be Mr. Underwood's counsel; is that correct?
> MR. MARLOW: I filed notice that the family has paid me to assist and represent Mr. Underwood in these charges. I wanted to make it abundantly clear that the resources that are being utilized for my services has not in any way come from Mr. Underwood himself. It is from his family.
> THE COURT: My primary concern in this question is "assist in the defense."

> It is just out of an effort to avoid any misunderstanding that what you are asking is to take full complete and sole control of the case; is that correct?
> MR. MARLOW: If Mr. Koger is going to be allowed to withdraw or otherwise disqualified, I am able, willing to take full responsibility for the representation of Mr. Underwood from this point forward.

The trial court's order substituting Mr. Marlow as defendant's counsel states that Mr. Marlow represented that:

> (A) he had been retained by the defendant's family to represent the defendant; (B) that if appointed counsel, Hershell D. Koger, is allowed to withdraw, he (Robert Marlow) was able and willing to take full responsibility for the representation of the defendant from that point forward; (C) that he was already familiar with the case as the defendant's family had been meeting with him since "shortly after the offense occurred", "after Thanksgiving 2004", and that he was previously aware of the trial date and had maintained his schedule so that he would be available for the trial date previously set; i.e. beginning April 6th, 2006, and (D) that he would not seek a continuance of the case.

Mr. Koger filed a motion to withdraw, and the trial court allowed Mr. Marlow to be substituted as counsel, noting that "[t]he Defendant is not entitled to both retained and appointed counsel."

The defendant appeals the substitution of Mr. Koger, arguing that the trial court should have allowed Mr. Marlow to *assist* Mr. Koger, not replace him. However, upon review, we find that the defendant has waived this issue. The defendant neither individually nor through trial counsel objected to the substitution of counsel until his motion for new trial. Moreover, the defendant and his counsel affirmatively represented to the trial court that they desired Mr. Marlow's replacing Mr. Koger. This court will not grant relief to a party "who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." Tenn. R. App. P. 36(a); *see also Lockhart v. Lockhart*, No. W2000-02922-COA-R3-CV, slip op. at 4 (Tenn. Ct. App., Jackson, Jan. 15, 2002) (noting that a party may not represent to an appellate court a position contrary to that which it maintained at trial court (citing *Melton v. Anderson*, 222 S.W.2d 666, 669 (Tenn. Ct. App. 1948)); *see also State v. Aucoin*, 756 S.W.2d 705, 715 (Tenn. Crim. App. 1988) ("[A] defendant may not object to the introduction of evidence on one ground, abandon this ground, and assert a new basis or ground for the objection in this Court."). It is apparent from the record that Mr. Marlow filed a notice to appear and assured the court that he would be prepared to handle the entire trial without need of a continuance. Furthermore, the defendant himself testified that he did not object to Mr. Marlow's replacing Mr. Koger as counsel. The trial court clarified that the purpose of Mr. Marlow's notice of appearance was to represent the defendant and not simply to be Mr.

Koger's co-counsel. Thus, the defendant's position at the pre-trial hearing is contradictory to the view he now espouses on appeal.

For the reasons stated above, we find that the defendant has waived the issue and we will not disturb the trial court's decision to substitute counsel for the defendant.

Ex Parte *Hearings on Defense Experts and Motion to Continue*

The defendant filed under seal with the trial court *ex parte* motions for expert services, specifically for the authorization of funds for a mitigation expert, a forensic neuropsychologist, and a DNA expert. The trial court held an *ex parte* hearing on December 7, 2005, when it denied the motions for expert services for a mitigation specialist and a forensic neuropsychologist; however, the trial court did not enter an order reflecting the denial of such services, and the defendant renewed his requests on March 20, 2006, in another *ex parte* hearing. On March 23, 2006, the trial court filed orders, under seal, denying both the December 7, 2005, and March 20, 2006 motions.

At the March 20, 2006 *ex parte* hearing in support of his motion for a mitigation specialist, the defendant presented the testimony of an experienced criminal defense attorney in capital cases who testified that mitigation investigation requires the preparation of a social history. He stated that "[t]he purpose of mitigation is . . . to explain the conduct" and that such conduct "can't be explained until it is investigated to determine the complete social history" of the defendant. He explained that a mitigation expert would conduct such an investigation and "then depending upon what evidence is uncovered, then it would be for the expert then to explain what it is in the social history which impacted that individual and resulted and influenced or maybe caused conduct which resulted in the conviction." The court reasoned that the mitigation expert was not necessary, noting that "the Court ha[d] previously granted the Defendant $5000.00 with which to hire a private investigator" and that the defendant's *ex parte* motion for a mitigation expert requested that same private investigator.

The defendant's motion requesting funds for a forensic neuropsychologist stated that the expert was needed to "review and interpret medical records, psychological and personality data, provide psychological testing on Defendant, advise and consult with counsel for Defendant regarding the same, and provide expert testimony to the Court if need be." The defendant claimed that he had "blackouts" and that he had a "blackout" episode when he was with the victims, and the defendant reasoned that a neuropsychologist was needed to determine how this would affect his *mens rea* and mitigate his sentence. The court noted that "the defendant was subject to in-patient psychiatric treatment services . . . . Those records are readily available, and the treating physicians may be subpoenaed to discuss the Defendant's mental issues." The court also reasoned that the defendant only desired a forensic neuropsychologist for mitigation purposes, not the guilt/innocence phase of the trial. The trial court determined that "there is no particularized need for a forensic neuropsychologist, as adequate evidence relating to the defendant's mental state is available from other sources."

On March 27, 2006, the defendant submitted another *ex parte* motion for an expert in DNA analysis. The defendant's request for a DNA expert included an affidavit from an expert who would assist in the investigation as well as present evidence "concerning the accuracy of state's DNA expert concerning the identification of the defendant by DNA examination to certain DNA evidence found at the crime scene." Further, defense counsel stated that the DNA expert would be important to discuss the differences between different methods of examining DNA. In the *ex parte* hearing on March 29, 2006, defense counsel argued that he only had a "rudimentary level of knowledge of DNA" and should be "entitled to assistance of an expert." Counsel maintained that he was "not asking for an expert to retest any of this evidence," but that a defense expert could assure that the State's DNA testing was accurate. Further, the defendant's counsel maintained that, without such an expert, he would not know how to adequately cross-examine the State's DNA expert. The trial court denied that motion, finding that the record "d[id] not establish a particularized need for the requested services" and that the record contained "only undeveloped or conclusory assertions that such services would be beneficial." The trial court also noted that the motion and record "contain[ed] assertions establishing only the mere hope or suspicion that favorable evidence may be obtained."

The defendant, however, was provided funding for certain expert assistance. The trial court granted an *ex parte* motion authorizing the employment of investigative services and then granted another *ex parte* motion authorizing additional funding for investigative services in the amount of $5,000. Further, the trial court granted an *ex parte* motion for expert services in fingerprint analysis.

Tennessee Supreme Court Rule 13, section 5, governs when an indigent defendant may be provided with the assistance of expert witnesses in criminal cases. "[T]he court, in an *ex parte* hearing, may in its discretion determine that investigative or expert services or other similar services are necessary to ensure that the constitutional rights of the defendant are properly protected." Tenn. Sup. Ct. R. 13, § 5(b); *see also* T.C.A. § 40-14-207(b) (2005) (authorizing funding for expert services to an indigent defendant pursuant to the supreme court rules). "Funding shall be authorized only if, after conducting a hearing on the motion, the court determines that there is a particularized need for the requested services . . . ." Tenn. Sup. Ct. R. 13, § 5(c)(1). The supreme court rules state that "particularized need" is established if a defendant "shows by reference to the particular facts and circumstances that the requested services relate to a matter that, considering the inculpatory evidence, is likely to be a significant issue in the defense at trial and that the requested services are necessary to protect the defendant's right to a fair trial." *Id.* § 5(c)(2); *see also State v. Barnett*, 909 S.W.2d 423 (Tenn. 1995) (recognizing that procedures providing expert assistance for indigent defendants are needed constitutional protections). The rule also sets forth some limitations on "particularized need":

> Particularized need cannot be established and funding requests should be denied where the motion contains only:

> (A) undeveloped or conclusory assertions that such services would be beneficial;
> (B) assertions establishing only the mere hope or suspicion that favorable evidence may be obtained;
> (C) information indicating that the requested services relate to factual issues or matters within the province and understanding of the jury; or
> (D) information indicating that the requested services fall within the capability and expertise of appointed counsel.

Tenn. Sup. Ct. R. 13, § 5(c)(4). Our supreme court has adopted a two-prong rule to determine "particularized need": "(1) the defendant must show that he or she 'will be deprived of a fair trial without the expert assistance'; and (2) the defendant must show that 'there is a reasonable likelihood that [the assistance] will materially assist [him or her] in the preparation of the case.'" *State v. Scott*, 33 S.W.3d 746, 753 (Tenn. 2000) (quoting *Barnett*, 909 S.W.2d at 430). We review a trial court's denial of expert services under an abuse of discretion standard. *See Barnett*, 909 S.W.2d at 431.

The trial court did not abuse its discretion in denying the defendant's *ex parte* motions for a mitigation expert and a forensic neuropsychologist. The mitigation expert that the defendant requested was the same investigating service for which the trial court had twice granted funding. Nothing suggests that defense counsel was not capable of reviewing mitigating evidence and the defendant's "social history." At the trial level, the defendant and his counsel had access to the defendant's medical records, criminal history, and mental health records, and counsel had the opportunity to interview the defendant. The defendant has failed to show a "particularized need" for a mitigation expert or why such an expert was required for a fair trial. The trial court did not err in denying defendant's request for a mitigation expert.

Further, the absence of a neuropsychologist did not diminish the defendant's ability to present a proper defense. The defendant had received a forensic evaluation by Centerstone to evaluate his competency to stand trial and his mental condition at time of the offense. Centerstone recommended that the defendant be referred to the secure Forensic Services Program of Middle Tennessee Mental Health Institute for further evaluation. The trial court noted that the doctors who do such evaluations "are not . . . hired guns for the DA's office" and that "[t]here is no reason why they can not help along with the doctors that already exist to provide the information and assistance that defense counsel seeks." We agree. The defendant had opportunities to subpoena treating physicians as experts; however, he did not use this opportunity at trial. "Courts are not required to find the defendant an expert who will support his theory of the case." *Ruff v. State*, 978 S.W.2d 95, 101 (Tenn. 1998) (citing *Ake v. Oklahoma*, 470 U.S. 68, 83, 105 S. Ct. 1087, 1096 (1985); *Barnett*, 909 S.W.2d at 431). The trial court did not err in denying the defendant's request for a forensic neuropsychologist.

The trial court did not abuse its discretion in denying the defendant's *ex parte* motion for a DNA expert. Although DNA is a complex subject matter, the defendant's counsel had the

necessary knowledge to sufficiently cross-examine the State's DNA expert, Mike Tuberville of the TBI. Counsel questioned Agent Tuberville regarding why he did not test hairs that were found at the scene of the crime and why he did not perform DNA testing more thoroughly at the scene. The defendant did not show that the denial of a DNA expert deprived him of a fair trial. In the present case, the DNA evidence linking the defendant to the crime scene and the victims was not the only convicting evidence. The defendant's fingerprint was found preserved in human blood at the scene and on the body of Ms. Ray, the defendant confessed to the stabbings, and a bloodhound tracked the defendant's scent from the stolen GMC pickup to an area near his house. Further, nothing in the evidence suggests that the defendant's DNA was misidentified or that the samples were contaminated. Taking this into consideration, it is difficult for this court to reason that a DNA expert would have materially assisted the defendant in trial preparation or that the defendant was denied a fair trial.

Lastly, defense counsel orally moved during the March 29, 2006 *ex parte* hearing and again during voir dire to continue the case in order to allow defense counsel to further prepare. The defendant argues that, in light of the trial court's denial of expert assistance, the denial of a continuance was prejudicial and consists of reversible error. As grounds for his motion to continue, defense counsel stated he needed "adequate time to properly investigate and develop mitigation evidence including mental health since the defense has been denied the assistance of those experts." However, the trial court noted in its order denying the request for continuance that defense counsel assured the court, upon his notice of appearance, that he would not be seeking a continuance. The trial court noted that defense counsel stated, "I have kept up with the calendar. I have got it marked-the trial date marked off on my trial calendar and sufficient time between now and then to be prepared. Based on what I know about the case, I do not anticipate moving for a continuance."

> [I]t has always been the rule in this State that a trial judge will not be put in error for denying a continuance unless it is shown that he has abused his discretion in doing so, because the granting or denying of a continuance is a matter which addresses itself to the sound discretion of the trial judge.

Moorehead v. State, 409 S.W.2d 357, 358 (Tenn. 1966) (citing *Bass v. State*, 231 S.W.2d 707 (Tenn. 1950)). An abuse of discretion is demonstrated by showing that the failure to grant a continuance denied the defendant a fair trial or that it could be reasonably concluded that a different result would have followed had the continuance been granted. *State v. Hines*, 919 S.W.2d 573, 579 (Tenn. 1995) (citing *State v. Wooden*, 658 S.W.2d 553, 558 (Tenn. Crim. App. 1983)). "The burden rests upon the party seeking the continuance to show how the court's action was prejudicial. The only test is whether the defendant has been deprived of his rights and an injustice done." *State v. Goodman*, 643 S.W.2d 375, 378 (Tenn. Crim. App. 1982) (citing *Baxter v. State*, 503 S.W.2d 226, 228 (Tenn. Crim. App. 1973)).

In this case, the defendant offers nothing to support his conclusion that the denial of a continuance "clearly was prejudicial to the defense." As discussed above, the defendant and his

counsel had ample means and opportunity to investigate and develop mitigating evidence. When defense counsel noted his appearance to the court, he assured the trial court that he was familiar with the case. Although defense counsel served as defendant's attorney for less than two months, the defendant had been represented by Mr. Koger for more than seven months prior to that. The record shows that Mr. Koger served as an aggressive advocate for the defendant, filing several motions regarding expert assistance, discovery, and continuance of the trial date. Further, we note that the trial court had ordered a continuance of the defendant's trial date on four separate occasions. The defendant did not suffer prejudice as a result of the trial court's denial of a continuance, and the trial court did not err.

Voir Dire

During voir dire examination, the defendant moved to dismiss for cause three jurors. The defendant asserts that, because the trial court erred in failing to dismiss said jurors, the defendant had to use all of his limited peremptory challenges. The defendant argues, "Since the state had filed notice of intent to seek life without the possibility of parole, it was imperative of defendant [sic] counsel to seek jurors that could and would consider mitigation evidence."

The first juror with whom the defendant takes issue is Kevin Gunter. Mr. Gunter stated, "[I]f [the defendant] has been found guilty, there is the only one sentence that I would give," referring to the death penalty. When asked if he could consider a life sentence, both with and without parole, Mr. Gunter replied, "If he is found guilty, the only thing I could see is life without parole. If you give him parole, then it is giving him an out." However, the State asked him whether he could set aside his personal opinion and "follow the law which you would have to consider, both forms of punishment," and Mr. Gunter replied that he could, although "[i]t would be hard."

The defendant also challenged Albert Cathey for cause. The trial court asked whether the jurors could consider mitigation if the defendant were found guilty, and Mr. Cathey responded, "Death without parole." However, when later asked if he could consider the sentences of life imprisonment or life imprisonment without parole, he answered that he would consider them as well as mitigating circumstances.

The defendant also alleges that the trial court erred by failing to excuse for cause Robert Parker. Mr. Parker stated, "If the State can prove to me without a doubt that he did this and did it heinously and did it in his right mind, then I would give him life without parole." Defense counsel then asked him if anything could "possibly persuade" him to impose any sentence less than the maximum, and he responded, "No, sir." Later in the voir dire proceedings, Mr. Parker stated that he could give "meaningful consideration" to mitigation factors and that he could be "open minded." He also explained his previous comments, "Don't take what I said harshly. I get a little nervous and sound harsh."

The defendant moved to excuse Mr. Gunter, Mr. Cathey, and Mr. Parker for cause, and the court denied the motions based on each juror's respective answers. The defendant appeals

and bases his argument on the contention that these jurors were incapable of considering mitigating evidence. As his sole authority, the defendant cites *Morgan v. Illinois*, 504 U.S. 719, 739, 112 S. Ct. 2222, 2235 (1992) ("Any juror to whom mitigating factors are . . . irrelevant should be disqualified for cause, for that juror has formed an opinion concerning the merits of the case without basis in the evidence developed at trial."). The defendant maintains that, because the trial court failed to excuse the aforementioned jurors, he was "forced" to accept jurors Geraldine Fullerton and William C. Burke. He argues that "[s]ince defendant had to use some, but not all of his peremptory challenges" on these three jurors, "the limited number of challenges had to be used to challenge other jurors with more compelling reasons for defendant's decision to exercise his remaining peremptory challenges."

Any error in failing to excuse a juror is harmless unless the jury that ultimately heard the case and convicted the defendant was "not fair and impartial." *State v. Howell*, 868 S.W.2d 238, 248 (Tenn. 1993) (citing *State v. Thompson*, 768 S.W.2d 239, 246 (Tenn. 1989)). It is well settled that "'a defendant who disagrees with the trial court's ruling on a for cause challenge must, in order to preserve the claim that the ruling deprived him of a fair trial, exercise a peremptory challenge to remove the juror.'" *State v. Jones*, 789 S.W.2d 545, 549 (Tenn. 1990) (quoting *Ross v. Oklahoma*, 487 U.S. 81, 89, 108 S. Ct. 2273, 2279 (1988)). "'Even then, the error is grounds for reversal only if the defendant exhausts all peremptory challenges and an incompetent juror is forced upon him.'" *Id.*

The defendant's argument fails to meet the threshold of reversible error in this well-settled area of law. Although the defendant contends that he had "more compelling reasons" to exercise his peremptory challenges on Ms. Fullerton and Mr. Burke, the defendant does not contend that the inclusion of these jurors on the final jury created an unfair or partial jury. Nothing in the defendant's brief shows that Ms. Fullerton or Mr. Burke were incompetent to serve as jurors.

Thus, we hold that any error committed by the trial court's failure to excuse for cause certain jurors was harmless and does not require reversal.

Sentencing Hearing

Because the jury returned verdicts of guilty for first degree premeditated murder, the jury then received instructions from the court regarding whether the defendant's sentences would be imprisonment for life or imprisonment for life without the possibility of parole. The jury sentenced the defendant to terms of life without the possibility of parole based upon the heinous nature of the crime. Therefore, the main issue before the trial court during the sentencing hearing was whether the two sentences of life without parole should run consecutively or concurrently.[7]

[7] The trial court, however, determined the sentence for the defendant's theft conviction. The trial court imposed the statutory maximum sentence of four years, citing as enhancing factors that the defendant had a previous history of criminal convictions and criminal behavior, that the offense involved more than one victim (it was related to the two murders), that the offense involved exceptional cruelty, and that the defendant, at the time of commission of the theft (continued...)

The pre-sentence investigation report was entered into evidence for the trial court's review. The report reflected that the defendant was 22 years old at the time of offense and showed 16 convictions, including two convictions of assault, two convictions of domestic violence, and two convictions of criminal trespass. The report stated, "Underwood has a lengthy criminal record with a history of probation revocations. He was on misdemeanor probation when the instant offenses occurred." The report indicated that the defendant claimed to have been diagnosed with "bi-polar disease, depression and schizophrenia" and was prescribed "seroquel, vistaril and lexapro." The report also stated, "Underwood reported that he smoked marijuana daily since age 14 until [] he was incarcerated for this offense. He also admitted to use of alcohol since age 14 and powder cocaine since age 21."

The trial court considered the information from the pre-sentence investigation report along with the trial evidence in light of Tennessee Code Annotated section 40-35-115, which governs when the court may impose consecutive sentencing. Code section 40-35-115 states in pertinent part:

> (b) The court may order sentences to run consecutively if the court finds by a preponderance of the evidence that:
>
> (1) The defendant is a professional criminal who has knowingly devoted the defendant's life to criminal acts as a major source of livelihood;
>
> (2) The defendant is an offender whose record of criminal activity is extensive;
>
> (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
>
> (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
>
> (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's

[7](...continued)

was on a form of community release.

> undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
>
> (6) The defendant is sentenced for an offense committed while on probation; or
>
> (7) The defendant is sentenced for criminal contempt.

T.C.A. § 40-35-115(b) (2005).

The trial court determined the second factor applied, noting, "Although I do not believe he has a prior felony, he has numerous, numerous misdemeanors. Also convictions. Also there is a record of criminal behavior in the record." The court reasoned that the fourth factor applied as well. Lastly, the trial court applied the sixth factor to the present case because "the defendant committed these offenses while on probation for misdemeanors out of court in other jurisdictions." The court concluded that, for these reasons, the defendant should serve his two life sentences without the possibility of parole consecutively.

On appeal, the defendant contends that his two consecutive sentences of life without parole are excessive. When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a *de novo* review of the record with a presumption that the trial court's determinations are correct. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *Id.* "The burden of showing that the sentence is improper is upon the appellant." *Id.* In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely *de novo*. *Id.* If appellate review reflects that the trial court properly considered all relevant factors and if its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

Also, in order to support the consecutive sentencing of a "dangerous" offender, *see* T.C.A. § 40-35-115(b)(4), "[t]he proof must . . . establish that the terms imposed are reasonably related to the severity of the offenses committed and are necessary in order to protect the public from further criminal acts by the offender." *State v. Wilkerson*, 905 S.W.2d 933, 938 (Tenn. 1995). The commission of crimes which are "inherently dangerous" does not by that fact alone justify consecutive sentences, because there are "increased penalties" for such crimes. *See Gray v. State*, 538 S.W.2d 391, 393 (Tenn. 1976); *Wilkerson*, 905 S.W.2d at 938.

Our review of the record shows that the trial court adequately considered all factors required in determining whether the defendant should receive consecutive sentences. At the sentencing hearing, the trial court, on the record, considered all trial evidence along with the

presentence report in accordance with Code section 40-35-115. Thus, we will attach a presumption of correctness to the trial court's sentence. *See Ashby*, 823 S.W.2d at 169. The defendant had an extensive criminal history, especially considering that at the time of offense he was only 22 years old. Although the defendant's criminal history included no felonies, it showed a propensity for violence (convictions for domestic violence and assault) and an abuse of community release (violations of probation and failure to appear in court). Further, the dangerous nature of the defendant was shown through the heinous nature of the homicide and the fact that it involved two victims. Lastly, the defendant clearly was on probation at the time of the offense. These facts adequately support the imposition of consecutive sentences pursuant to Code section 40-35-115. Further, while the existence of a single category is sufficient to warrant the imposition of consecutive sentences, *see State v. Adams*, 973 S.W.2d 224, 231 (Tenn. Crim. App. 1997), the trial court found three factors applied to the defendant. We affirm the trial court.

Conclusion

In light of the foregoing analyses, we affirm the convictions and sentence.

_____

JAMES CURWOOD WITT, JR., JUDGE